



Montana Department of LABOR & INDUSTRY

Governor Steve Bullock
Commissioner Pam Bucy

Commissioner's Office

Date: March 28, 2016
To: Board Members of the Boards administratively attached to the Department of Labor and Industry
From: Pam Bucy, Commissioner of Labor and Industry
Re: Federal Trade Commission Guidance issued 10-14-15 regarding North Carolina State Board of Dental Examiners v. FTC, 135 S.Ct. 1101 (2015)

As many of you know, in February of 2015 the United States Supreme Court issued the North Carolina State Board of Dental Examiners v. Federal Trade Commission decision regarding the status of antitrust immunity for members of professional and occupational licensing boards. The Court ruled that boards made up of licensed members of a profession do not have immunity from personal liability for board decisions that restrict trade, unless the boards are subject to "active supervision." In October, the Federal Trade Commission (FTC) issued guidance regarding how it would interpret the requirement of "active supervision." The FTC is a federal regulatory agency that has authority over state licensing boards regarding anti-trust law, and its guidance sends a clear message. Simply stated, the FTC views the active supervision prong satisfied only if an entity that is not subject to the licensing and discipline power of a board has veto power over the decisions of a board that restrict competition. Active supervision is met when a governmental entity outside the authority of the board has the ability to weigh and determine whether board decisions are in the proper role of government.

The Supreme Court case recognizes the potential conflict of interest for a licensee in regulating a profession when that person has a vested interest in making a living through that profession. However, the case also explicitly recognizes that regulation is a proper police power of the state and antitrust immunity is established when active supervision is met. And importantly, the decision acknowledges the value of having licensed professionals conduct the regulation of a profession with their special expertise.

There are significant ways in which Montana's laws differ from North Carolina's, such that active supervision is in practical effect. Section 37-1-131, MCA, sets out the duties of boards. Pursuant to this section, Montana's boards are currently required to apply the standards and rules of a profession in a manner that does not restrain trade or competition unless necessary to protect public health and safety. Further, the Commissioner's legal staff advises the boards whenever board decisions are such that anti-trust immunity may be lost because a decision unreasonably restrains trade.

Although Montana's statutes are different than North Carolina's, the FTC guidance requires that explicit active supervision of boards is in place, to meet the North Carolina case requirements for immunity from suit. Therefore, until such time as the Legislature chooses to enact more explicit provisions for active supervision, Department of Labor legal staff will continue to monitor board decisions and will continue to advise boards not to regulate or discipline licensees in a manner that unreasonably restrains trade. If a board chooses to regulate or discipline licensees in a manner that unreasonably restrains trade

contrary to the express legal advice of Department attorneys, then the board members shall be advised that they risk losing their personal immunity from suit.

Attached to this letter is the North Carolina case and the FTC Guidance. Please direct questions to the legal staff for your respective boards.